# DACA - DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Beyond the FAQs

ABSTRACT
Review of the basic requirements of the program, more advanced immigration law issues in assessing a client's case, and suggestions for a framework for analyzing possible DACA cases.

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April 21, 2014

# DACA
# Deferred Action for Childhood Arrivals:
# Beyond the FAQs

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## I. INTRODUCTION

Deferred Action for Childhood Arrivals (DACA) has been a life-changer for over a half million young people who came to the U.S. without inspection or whose visas expired as of June 15, 2012. Today, these half million are in receipt of their proper identity and work eligibility documentation.

Some 72,911 applications are pending with U.S.C.I.S. -- neither adjudicated nor denied. With only 15,968 denials thus far, no regulations, and only a set of often-changed FAQs to serve as guidance, practitioners have maneuvered through a minefield of issues. Now that many of the easily-approvable current students have applied and been approved, we see more applicants with issues: criminal records, prior deportations, absences during the period of required residence, scanty documentation, not in school and no high school diploma.

Immigration lawyers should be comprehensive in our approach to screening all potential clients for DACA eligibility, whether they come to our offices inquiring about DACA or not. Besides the obvious benefits of deferral of removal and a work permit, DACA can help solve some very difficult immigration issues, providing at least temporary relief or a path to a permanent fix for people with final orders of removal, false claims to citizenship, perhaps even inadmissibility for minor drug crimes. And, like the thousands of Salvadorans and Guatemalans who registered for TPS in 1991, DREAMers are becoming more fully integrated as they obtain the right to work and the means to move out of the shadows of society. TPS and the ABC settlement were instrumental in the eventual enactment of NACARA; ojalá que the Dream Act likewise follows on the heels of DACA.

In this paper, we will review the basic requirements of the program, address more advanced immigration law issues in assessing a client's case, and suggest a framework for analyzing possible DACA cases.

## II. BASIC REQUIREMENTS

**Requirement 1:**
**Came to the United States before reaching your 16th birthday**. Tricky.

At first blush it appears that any footfall in the U.S. before age 16 would suffice, even if the applicant left immediately, turned 16, and then returned on June 14, 2007. However,

U.S.C.I.S. FAQ 1 under the "Miscellaneous" heading instructs that an applicant who left the U.S. and returned after his 16th birthday must demonstrate that he "established residence" in the United States before his 16th birthday, for example that he "attended school or worked in the United States during that time, or . . . lived in the United States for multiple years during that time."

This rule seems to foreclose eligibility for that person who was here on a brief visit as a small child but left and returned before June 15, 2007 but after turning 16. With such a person it may be worth bringing his parents into the conversation; an immigrant who was here for two years at ages 1 to 3 while his parents were working in the U.S. may be unaware of the length of time he was here or the circumstances of that stay. Such a child might be able to prove by showing vaccination records and parents' work history the he in fact "established residence" in the U.S. before age 16. It may be significant that the DACA SOP instructs adjudicators to simply look for evidence of presence (of no particular duration) before the applicant's 16th birthday and to look for evidence of continuous residence from June 15, 2007 through the date of application.

**Requirement 2: Continuous Residence since June 15, 2007 to present**.

The FAQs explain that:

A brief, casual and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States, your absence will be considered brief, casual and innocent if it was on or after June 15, 2007, and before Aug. 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;
2. The absence was not because of an order of exclusion, deportation or removal;
3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation or removal proceedings; and

The purpose of the absence and/or your actions while outside the United States were not contrary to law.

**Requirement 3: Under 31 years of age as of June 15, 2012**.

This requirement is fairly self-explanatory unless the applicant's birthday is June 15, 1981. Hmm. That person turned 31 on June 15, 2012. Happy birthday! You're not eligible. Or are you? Unfortunately, the recently-released DACA SOP provides this clarification: "one of the guidelines to be met before an individual is considered for DACA is that the individual was not age 31 or older on June 15, 2012. In other words, the DACA requestor was born after June 15, 1981." So the probrecito born on June 15, 1981 is out, according to the SOP.

**Requirement 4: Entered EWI before June 15, 2012 or lawful immigration status expired as of June 15, 2012**.

Those in status in the U.S. on the date of the announcement are ineligible to apply for DACA under the current guidance.

**Requirement 5: Education requirement/honorably discharged veteran.**

We are of the opinion that for the most part any "honorably discharged veteran" would have sought other means to legalize her or his status. It would be interesting to know if any DACA applicants have applied based on having been honorably discharged from the U.S. armed forces.

The school requirements for DACA are more relaxed than previously drafted DREAM Act provisions requiring completion of high school and/or college. This is a requirement where accurate messaging to the potential applicant pool could yield a significant increase among those who have yet to apply. Some potential applicants seem to think they cannot apply if they **didn't go to school in the U.S**. It is our job to let them know there is still a chance! They may enroll in a number of education programs that meet the requirements according to U.S.C.I.S.. The memorandum creating DACA states that applicant must show he or she is "currently in school, has graduated from high school, [or] has obtained a general education development certificate." Currently in school is not defined to include only elementary, middle and high school but also GED, ESL, literacy and job training programs.

Practitioners should guide clients to reliable educational sources for programs that meet the education requirements. According to the FAQs, enrollment in programs not partially or wholly funded by federal or state grants may meet the educational requirements where they are "administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges and certain community-based organizations." A reliable source the Department of Education http://wdcrobcolp01.ed.gov/Programs/EROD/org_list.cfm?category_ID=DAE which has programs by state. In the case of Texas, one may refer to the Texas Workforce Commission to find an acceptable adult education program in the applicant's area.

Additionally, clients should be informed that enrollment in an acceptable educational program must be documented with either graduation verification or documentation of substantial measurable progress toward graduating from a school where the applicant is enrolled. DACA applicants must be persistent and complete their programs. US CIS has issued RFEs requiring that first-time applicants show that they have completed their educational programs or made "substantial measurable progress toward graduating from school." US CIS should be commended in promoting educational attainment and as advocates we must do our part to ensure that our clients stay the course with their studies. It is still unclear what requirements will be

under DACA renewal. But it appears if a DACA recipient has received DACA and demonstrated he or she meets the educational requirements there will be no need to provide additional documentation.

**Requirement 6. No felonies, significant misdemeanors or three or more misdemeanors and no threat.**

Those who have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct are not considered eligible for DACA except where DHS determines there are exceptional circumstances.

The DACA guidelines provide that an applicant is ineligible for deferred action if he has been convicted of three misdemeanors or one "significant misdemeanor" or felony. For this purpose, a felony is a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year. A misdemeanor is defined as a crime for which the maximum penalty is one year or less but greater than 5 days. A crime is a "significant misdemeanor" if it meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or,
2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

A minor traffic offense is not considered a misdemeanor for purposes of this process. However, an applicant's entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, a warrant of an exercise of prosecutorial discretion is appropriate. It is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed.

A juvenile tried and convicted as an adult will be treated as an adult for purposes of the DACA process. If the background check or other information uncovered during the DACA review indicates that that an applicant's presence in the United States threatens public safety or national security, an exercise of prosecutorial discretion for DACA will not granted be except where DHS determines there are exceptional circumstances. Indicators that an applicant poses such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.

**Requirement 7. Presence on June 15, 2012 is mandatory.**

How sorrowful is it for DREAMers who may have been in the removal system and deported prior to the implementation of DACA.

## III. DACA NUANCES

DACA doesn't conform to familiar frameworks for immigration benefits. For example, neither the announcement published on June 15, 2012 nor the guidelines and FAQs disseminated later make any reference to grounds of inadmissibility. Nor do the guidelines reference any statutes or regulations. See Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, DHS Secretary Janet Napolitano, June 15, 2012, Infonet Doc. No. 12061544 (posted 06/15/2012) and guidelines and FAQs available at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process .

DACA, however, doesn't exist in a vacuum. The rules for DACA present new and interesting interplays with existing statutory and regulatory provisions which affect our immigrant clients. Below are some examples:

### 1. DACA may be granted despite existing grounds of inadmissibility or deportability.

#### A. Criminal grounds of inadmissibility: INA 212(a)(2) and 237(a)(2)

Significantly, crimes involving moral turpitude and possession of controlled substances -- offenses which often trigger inadmissibility -- are not necessarily significant misdemeanors (see page 4 above), while any DWI offense or domestic violence offense -- which ordinarily would not result in inadmissibility -- renders a DACA applicant ineligible for deferred action.

As an example, a DACA application may be granted to an applicant who has been convicted of two misdemeanor shoplifting offenses. The same individual will require a 212(h) waiver if he later applies for adjustment of status through "normal" means. If he is adjusting through a family petition, a waiver will generally be available -- parent, spouse and children are qualifying relatives under section 212(h) -- but if he later seeks to become a resident through an employment-based petition (or perhaps a 4th preference family petition) and does not have a qualifying relative for a waiver, he may find that his DACA EAD is the end of the road.

The same goes for a DACA applicant with a conviction for simple possession of a controlled substance. Because DACA eligibility is not per se premised on admissibility, a young person may be granted DACA despite a misdemeanor conviction for possession of a controlled substance. When the DACA grantee later seeks to obtain permanent residence, however, he will be permanently inadmissible and ineligible for any waiver unless the conviction was for possession of less than 30 grams of marijuana. See sections 212(a)(2)(A)(i)(II) and 212(h) of the INA.

Young people who are inadmissible on criminal grounds but still eligible for DACA should be advised of the very real possibility that they will never be eligible for permanent residence. Whether they should apply for DACA is a decision they must carefully consider. On

one hand, there exists the possibility that Congress may someday pass the DREAM Act and that those who are granted deferred action under DACA may also be eligible to adjust despite certain grounds of inadmissibility. On the hand, there is also the possibility that DACA benefits will be denied in the exercise of discretion and that the DACA application will have served only to bring the young person and his criminal record to the attention of DHS.

B. **False claims to United States citizenship and other misrepresentations**

There is no place on the current I-821D where one must admit having entered the United States through fraud or misrepresentation or having committed a misrepresentation on an earlier application for immigration benefits. The form asks for date and place of entry and for the person's status on June 15, 2012. This question may (as is suggested on the form itself) simply be answered "no lawful status". There is no question asking whether one has claimed to be a U.S. citizen or voted in the United States. Like the criminal grounds of inadmissibility, however, the grounds of inadmissibility found at sections 212(a)(6)(C) and 212(a)(10)(D) of the INA may someday affect even the successful DACA applicant.

Many young people who have grown up in the United States and speak perfect English (or even Texas English) have claimed to be United States citizens for employment purposes, when applying for financial aid for school, or when entering the United States. As we know, section 212(a)(6)(C)(ii) makes a false claim to U.S. citizenship, made for purposes of obtaining a benefit under the INA or any other law, a permanent and unforgiveable ground of inadmissibility.

The government recently announced a policy which limits the use of the false claim ground of inadmissibility where the false claim was made by a minor. In letters to Senator Harry Reid, U.S.C.I.S. and the State Department each stated that 1) only a knowing false claim will trigger inadmissibility under section 212(a) (6) (C) (ii) of the INA and 2) that an "affirmative defense" to this ground of inadmissibility may be established where the individual was under 18 at the time of the false claim and "at that time lacked the capacity to understand and appreciate the nature and consequences of a false claim to citizenship". An applicant for admission or adjustment must establish this defense "clearly and beyond doubt". See AILA Doc. No. 13092060 (posted 9/20/13).

The new exception may benefit some DREAMers who made false claims to citizenship before their 18th birthdays but we have little experience with this policy and do not yet know how it may be construed by the DHS and DOS. Practitioners must counsel DACA clients that even though a false claim to citizenship does not affect DACA eligibility, it will affect their eligibility to adjust status under existing law. Some DACA applicants may be tempted to make false claims even after they receive work authorization; for example, in applications for financial aid for college.

Practice Pointer: Clients should be warned that this type of false claim will ruin their chances of ever receiving permanent status under existing statutory authority.

### C. The 3- and 10-year bars

At this point, some initial applicants for DACA may be over 32 years old. By definition, they have been present in the United States unlawfully for more than one year. Other applicants are under 18 years of age and have not accrued any unlawful presence to trigger the 3- and 10-year bars of section 212(a) (9) (B) of the INA.

According to the FAQs on the U.S.C.I.S. website, a DACA applicant who files his application before his 18th birthday will not accrue any unlawful presence unless and until deferred action is terminated. This is true even if the DACA application is not adjudicated until after the applicant's 18th birthday. For applicants who file their applications after turning 18, however, unlawful presence will continue to accrue until the application is granted.

Practice Pointer: If a potential DACA applicant comes to you before his 18th birthday, you should strongly encourage him to file his application before his birthday.

By doing so, you will have spared your client from the harsh consequence of the 212(a) (9) (B) bar and from the need to apply for a waiver of inadmissibility if someday your client must consular process an immigrant visa. You should also be on the lookout for current clients (for example, derivative children on visa petitions you have filed where the visa number is not yet current; stepchildren of U.S. citizens) who may benefit from a timely filed DACA application.

Even if the applicant is already 18, a quickly-filed application may be adjudicated before he accrues 180 days of unlawful presence (180 days after his birthday) and again you will have given your client a much less painful route to permanent residence in the future. Filing a DACA application will also remove the time pressure in immigrant visa processing cases – So long as the DACA application prevents the accrual of 180 days of unlawful presence, the client can (within reason and always with an eye to the CSPA and section 203(g) revocation) take his time to complete immigrant visa processing. This is a great benefit to high school students who before DACA often had to get the hell out of Dodge before turning 18 and a half, disrupting their senior year studies and missing proms and graduation ceremonies.

### D. Other grounds of inadmissibility

Although the criminal, unlawful presence and misrepresentation grounds of inadmissibility may be the more common issues, practitioners should also be on the lookout for other grounds such as the 212(a)(6)(E) alien smuggling ground. A Dreamer who has successfully avoided the 212(a)(9)(B) bars by means of a timely filed DACA application could still find himself declared inadmissible on this ground if, after reaching an age of criminal responsibility, he traveled illegally to the U.S. accompanied by a younger sibling. Since this finding may be made at a consulate outside the United States and no waiver is available for having aided the unlawful entry of a sibling (see INA section 212(d) (11)), the Dreamer could find himself marooned on the other side of the border.

## 2. DACA and adjustment of status

Those who have DACA have interesting questions related to the opportunity to adjust via U.S. family members. For those who were inspected and admitted with a non-immigrant visa and are now married to U.S. citizens, DACA is not really relevant. In fact, many of the young people who have consulted on the issue of DACA eligibility found that they were eligible to adjust status through U.S. citizen spouses and chose that route rather than apply for DACA. The issue is really about those who came to the U.S. without inspection and admission. They are the ones who may have come in very precarious ways such as in the inner tube of a tire with a worried parent guiding their way. They want to know should they apply for advance parole and consider adjusting after re-entering vis-à-vis parole.

When the DACA program was announced, immigration lawyers soon began asking whether it might provide a means for non-245(i)-eligible individuals to adjust status without undergoing immigrant visa processing abroad and without the need for a 212(a)(9)(B) waiver (for those who, by virtue of their age, did not avoid the bars as described above).

The answer to the first question – can DACA provide a means to adjust status under 245(a) -- is a fairly simple "yes". An individual who holds deferred action under the DACA program may apply for advance parole if he needs to travel abroad due to a humanitarian need or in connection with education or employment. A Dreamer who is the immediate relative of a U.S. citizen and who has a legitimate need to travel for one of these reasons may obtain an advance parole, travel outside the U.S., re-enter lawfully, and then apply for adjustment of status. That much is clear.

The answer to the second question – Will a DACA holder who travels with advance parole trigger the section 212(a)(9)(B) bars when he leaves the country? – is not so simple. Not long before the announcement of the DACA program, the Board of Immigration Appeals published Matter of Arabella and Yerrabelly, 25 I. & N. Dec. 771 (BIA 2012). In that case, two applicants for adjustment of status traveled with advance parole while their adjustment applications were pending. Because they had accrued more than one year of unlawful presence before filing their adjustment applications, U.S.C.I.S. determined that they triggered the 212(a)(9)(B) bar when they traveled. They were not eligible for waivers and so their adjustment applications were denied. The Board ruled, however, that the fact that they obtained advance paroles before departing saved them from triggering the bar and that they did not need waivers.

When DACA applicants first started applying for advance paroles, some parole documents were issued which actually contained a proviso saying that, due to the Arrabally decision, the holder would not incur the 212(a)(9)(B) bar by traveling. However, parole documents issued to DREAMers more recently do not contain that proviso. The factual scenarios of DACA recipients differs from those of the respondents in Arrabelly Yerrabelly. There, the matter concerned two individuals who received advance parole pursuant to pending adjustment of status applications. It remains to be seen if U.S.C.I.S. will apply the Arrabelly Yerrabelly rationale in the case of DACA recipients. A reasonable interpretation would suggest that U.S.C.I.S. would not grant advance parole to eligible DACA recipients only to penalize them with an unlawful

presence bar following a valid advance parole entry. U.S. C.I.S should uniformly include the Arrabelly proviso on all parole documents issued to DACA holders.

An encouraging development is that the Administrative Appeals Office appears to be applying Arrabally in similar circumstances. They have issued more than one unpublished opinion indicating that TPS-holders who travel after obtaining advance parole do not incur the bar. See, for example, 2012 WL 9161337 (decided Oct. 3, 2012).

Still, until there is additional guidance from U.S.C.I.S., practitioners should be judicious in advising DACA-holders who have accrued 180+ days of unlawful presence and who are considering obtaining advance paroles in order to adjust status. While virtually all such adjustment applicants have a qualifying relative for a 212(a)(9)(B) waiver (U.S. citizen or lawful permanent resident spouse or parent), if U.S.C.I.S. demands a waiver they must be able to demonstrate extreme hardship to the qualifying relative. The risk would appear fairly minimal, however, since if the waiver and the I-485 were denied the applicant would presumably be able to fall back on his still-valid deferred action.

U.S.C.I.S. guidance provides that once one has been approved for DACA, the individual may apply to travel with a Form I-131 to request advance parole to travel outside the United States. If travel occurs without advance parole, DACA is automatically terminated.

Practice Pointer: Provide Very Clear Advice to Clients Not to Travel without Advance Parole. Vacation to Cancun is not a good reason to apply and advance parole will only be granted if travel is for:

- Educational purposes such as semester abroad programs or academic research;
- Employment purposes such as overseas assignments, interviews, conferences, training or meetings with clients; or
- Humanitarian purposes such as travel to obtain medical treatment, attend funerals service for a family memo or visit an ailing relative.

## IV. ANATOMY OF A DACA CASE

In thinking through the various issues that arise when counseling clients on the DACA process, often times the case scenarios present interesting fact patterns that require sorting pieces of a puzzle. We have included the following scenario as challenge to fellow practitioners at the AILA conference in Dallas, Texas.

> Benjamin comes to see you about having his LPR father file an I-130 on his behalf. He was born on July 4, 1987. Since he was born after June 15, 1981, you think of the Dreamer program.
> It turns out that Benjamin entered the United States initially in 2002, with a visitor visa. His father was already living in the U.S., so Benjamin enrolled in school and studied here for three years. In fact, he completed all the courses necessary for a high school diploma but he couldn't pass the exit

exams, so he didn't get a diploma. Discouraged, he went back to Mexico. He returned to the U.S. on June 1, 2007 (age 19) with the same visitor visa he had used before. He didn't get an I-94, he entered as a border crosser. However, once he got to Texas he realized how much he missed being here and he decided to stay.

Recently he heard that he could get a high school diploma through a home school program. He paid $500 to Cash-only Academy in Houston and took a one-hour test, and they gave him a diploma.

Benjamin also tells you that not long after his entry in 2007, he was with some friends at a club and someone was passing around a reefer. The police raided the club because they were serving alcohol to minors and he got caught with the half-burned reefer in his pocket. He pleaded guilty to possession of marijuana and was given deferred adjudication. He has no other criminal record.

He also tells you that when he was 16 he had a job at Baskin Robbins and he thinks he filled out some forms where he said he was a U.S. citizen.

Benjamin has a child with his LPR girlfriend and he lives with her. He hasn't married her because he heard that he would have to go to Mexico for a residence interview and he also heard that he should stay single and let his father petition for him.

1. ***Is Benjamin eligible for DACA?***

2. ***Could he become eligible?***

3. ***How will his immigration and criminal history affect his ability to immigrate in the future?***

## V. MOVING FORWARD

There are numerous issues that arise for clients in the context of DACA. These young clients should be guided beyond what happens when they receive their approval notices and work permits. It is advisable to provide information on their employment rights, how to get driver's licenses, apply for a social security cards, credit under the earned income tax credits.

As of this date, U.S.C.I.S. and U.S. I.C.E. have now provided guidance on the DACA renewal process which can now be found at the links below:

http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process

http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/ice-granted-daca-renewal-guidance

With all the benefits that DACA provides, it remains a stop-gap measure until lasting immigration reform occurs such that those with DACA can apply for legal permanent residence and ultimately become U.S. citizens. The legislation passed by the U.S. Senate allows for those with DACA to apply for and receive U.S. Legal Permanent Residence in an expedited manner. It stands to reason that if a young person is eligible for DACA then they should unequivocally be eligible for legal permanent residency under any future reform legislation.

## VI. AILA ADVOCACY

In Texas, there are still nearly 47,000 of the estimated eligible who have yet to apply for DACA. Surely, there are many barriers for many such as; fear and reluctance, lack of parental permission, societal stigma, misinformation on the requirements, inadequate support systems, particularly in rural communities.

As DREAM Defenders, Texas AILA members might consider collaborating with Texas Access to Justice Foundation and other collaborators in the planning of a first-ever statewide "DACA Day" where free legal clinics will be held in at least nine regions throughout the state of Texas on August 16, 2014. The purpose of this initiative is to raise awareness about DACA and to provide DACA services to those who have yet to apply in underserved communities.

In the next few weeks, check out: http://texaslawhelp.org/resource/deferred-action-for-childhood-arrivals-free-l?ref=SeMo8 for more information on this collaborative undertaking.

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